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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948-'49

Nos. ~~299-304~~ 1 4 = 9

UNITED STATES OF AMERICA, *Petitioner*
vs.
GERLACH LIVE STOCK COMPANY (a corporation)

UNITED STATES OF AMERICA, *Petitioner*
vs.
J. SHELDON POTTER

UNITED STATES OF AMERICA, *Petitioner*
vs.
MARTIN ERRECA

UNITED STATES OF AMERICA, *Petitioner*
vs.
JAMES J. STEVINSON (a corporation)

UNITED STATES OF AMERICA, *Petitioner*
vs.
ARCHIBALD J. STEVINSON

UNITED STATES OF AMERICA, *Petitioner*
vs.
3-H SECURITIES COMPANY

On Petition for Writs of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Subject Index

	Page
Opinions Below and Jurisdiction	2
Statement of the Case	2
The Findings	12
Plaintiffs' Claims	14
Argument	14
I. Even if the project was to any extent in aid of navigation or flood control, it is clear from both the state and federal history of the project and the terms of the plan itself that Congress did not intend to rely upon that fact to enable it to destroy vested rights of irrigators without compensation, but on the contrary expressly provided for compensation to the irrigators of both cultivated lands and grass lands	14
II. The acts of the defendant in closing the dam and impounding 17,400 acre feet of water in October, 1941, constituted a taking of plaintiffs' rights	18
III. The court was fully justified in awarding interest from October 20, 1941, to date of the taking	19
IV. The findings as to the right taken were sufficient	20
V. The ruling of the Court of Claims that the California constitutional amendment in no way deprived the plaintiffs of their right to compensation for depreciation in value of their land by the taking of all the water of the river, was fully justified	21
Conclusion	22

Table of Authorities Cited

Cases	Page
Brooks v. Dewar, 313 U.S. 354, 360-361	8
City of Elsinore v. Temescal Water Company, 36 C. A. (2d) 116, 97 P. (2d) 274	21
City of Lodi v. East Bay Municipal Utility District, 7 Cal. (2d) 316, 60 P. (2d) 439	21
City of Los Angeles v. Aitken, 10 C. A. (2d) 460, 52 P. (2d) 585	21
Collier v. Merced Irrigation District, 213 Cal. 554	19
East Bay Municipal Utility District v. City of Lodi, 120 Cal. App. 740, 762	20
Gerlach v. U. S., 102 Ct. Cls. 392	3
Henry Ford & Son v. Little Falls Fibre Company, 280 U.S. 369	15
Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81 (certiorari denied 271 U.S. 486)	4
Hillside Water Company v. City of Los Angeles, 10 Cal. (2d) 677, 76 P. (2d) 681	21
Jackson v. United, 230 U.S. 1, 18	4
Livermore v. Beal, 18 C. A. (2d) 535, 540-1	4
Los Angeles County Flood Control District v. Abbot, 24 C. A. (2d) 728, 76 P. (2d) 188	21
Meridian, Ltd. v. The City and County of San Francisco, 13 Cal. (2d) 424, 90 P. (2d) 537	21
Montana-Dakota Utilities Co. v. Federal Power Com'n, 169 F. (2d) 392, 397	16
Nebraska v. Wyoming, 295 U.S. 40, 43	15
Silas Mason Co. v. Tax Comm., 302 U.S. 186, 208	15
United States v. Central Stockholders, 43 F. (2d) 977, 52 F. (2d) 322	4
United States v. Dickinson, 331 U.S. 745	18

Page

Williams v. City and County of San Francisco, 24 C. A. (2d) 630, 76 P. (2d) 182 21

Miscellaneous

43 U.S.C.A., Secs. 383 and 421 9

50 Stats. 844, 850 3

54 Stats. 1198 3

Act of December 5, 1924 (43 Stat. 702) 8

California State Bulletin No. 25 3

Feasibility Report, H. Doc. 146, 80th Cong., 1st Sess., pp. 12, 14 7

Flood Control Act, Sec. 1(b) of December 22, 1944, 58 Stat. 887 15

Hearings before the Committee on Flood Control, House of Representatives, Seventy-fourth Congress, First Session, Central Valley Project of State Water Plan of California 9

Hearings before House Committee on Appropriations, pp. 281-282 8

Hearings before House Committee on Appropriations, p. 349 8

Hearings before House Committee on Appropriations, pp. 421-422 8

Hearings before the House Committee on Appropriations, Interior Department, 74th Cong., 2nd Sess., pp. 179-181 .. 8

Hearings before House Committee on Appropriations, Interior Department, 79th Cong., 1st Sess., p. 1200 8

Hearings on the Interior Department Appropriation Bill for 1938 10

House Document No. 332, 65th Congress, First Session, p. 13 4

House Document No. 332, 65th Congress, First Session, par. 55, p. 38 5

House Document No. 791, 71st Congress, Third Session, dated February 27, 1931, pp. 6, 8, 13 and 19 5

House Report 161, 76th Cong., 1st Sess., p. 16 8

	Pages
House Report 786, 75th Cong., 1st Sess., p. 15	8
House Report 1855, 75th Cong., 3rd Sess., p. 14	8
Interior Department Appropriation Act for fiscal year 1938, 50 Stat. 597	8
Interior Department Appropriation Act for fiscal year 1939, 52 Stat. 291	8
Interior Department Appropriation Act for fiscal year 1940, 53 Stat. 685	8
Reclamation Act (Secs. 7, 8) of 1902 (32 Stat. 88):	
43 U.S.C.A. 383	8
43 U.S.C.A. 421	8
Rivers and Harbors Act of August 26, 1937 (50 Stat. 844, 850)	3, 6
Rivers and Harbors Document Numbered 35, Seventy-third Congress	6
Stats. Cal. 1933, p. 2643 at p. 2651, Sec. 11	4

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OPINIONS BELOW AND JURISDICTION.

These are adequately covered by the petition (p. 2).

STATEMENT OF THE CASE.

The petitioner's statement of the case is based on the claim that the Court of Claims disregarded the Congressional declarations that the Central Valley Project was in aid of navigation. Our answer is that the Court of Claims merely interpreted the Congressional declarations and held that they did not amount to declarations that the taking of all the water of the San Joaquin River for irrigation was in aid of navigation or flood control. On the contrary we claim that the Department of Justice has disregarded the Acts of Congress, the acts of the President, and of the Bureau of Reclamation, showing that the use was for private irrigation and that the taking in aid of it should be compensated for; and that Congress has in fact appropriated money for the payment of damages to the owners of the land involved in three of the cases at bar and of other lands. The petition is apparently filed pursuant to a contract between the Government and Miller & Lux Incorporated, the former owner of the land involved, by which the Government obligated itself to seek such a review irrespective of the correctness of the decree below. (Appendix p. xiv.) In the other three cases the Court of Claims merely applied the same rate of compensation fixed by

the Government in the three cases. The correctness of our contentions is shown by the following;

(1) The Central Valley Project consisted of the storage of the water of the *Sacramento River* and the use of it in aid of navigation on the Sacramento River and for irrigation and power, and the storage of the water of the *San Joaquin River* and the use of all of it for irrigation and made no provision for the use of any of the water of the San Joaquin River in aid of navigation (Appendix pp. iii, v, ix);

(2) The only Congressional declaration prior to the taking was that the *Central Valley Project* was in aid of navigation (50 Stats. 844, 850; 54 Stats. 1198);

(3) The Court of Claims on demurrer construed the Congressional declarations as applying to that part of the Plan that related to the water of the Sacramento River and not as declarations that the taking of all the water of the San Joaquin River for irrigation was in aid of navigation (*Gerlach v. U. S.*, 102 Ct. Cls. 392);

(4) The defendant in its answer set up no easement or other right of the Government in the water of the San Joaquin River (R., pp. 26, 52, 154, 160);

(5) The defendant on the trial offered no evidence that the storage or diversion of water of the San Joaquin River was in aid of navigation (R., pp. 103-104);

(6) The Plan was first formulated by the State of California and State Bulletin No. 25 stated:

"Dependence upon eminent domain offers the only certain expedient in dealing with the riparian objector";

(7) The Act of the Legislature of California regarding the Project (Stats. Cal. 1933, p. 2643 at p. 2651, Sec. 11) provided:

"In no other way than by purchase or otherwise as in this act provided shall said water rights as herein defined, of said watershed, area or the inhabitants be impaired or curtailed";

(8) The Supreme Court of California had held that the water of the San Joaquin River was used primarily for irrigation and the storage thereof was not in aid of navigation (*Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81 (Certiorari Denied 271 U.S. 486));

(9) The United States Courts for California in *United States v. Central Stockholders*, 43 F.(2d) 977, 52 F.(2d) 322, had decided that storage on that river was not in aid of navigation;

(10) In House Document No. 332, 65th Congress, First Session, page 13,[1] it was stated in regard to the San Joaquin River:

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[1]In this brief we shall refer to many Governmental Reports, Plans, etc., which are not in the record as filed in this Court, except to the extent that they are recited in the findings. The Court takes judicial notice of such documents (*Jackson v. United States*, 230 U.S. 1, 18). We shall also refer to many official acts of the President, the Reclamation Bureau, or the Secretary of the Interior, which are not in the record as filed in this Court. Of these we likewise believe that the Court takes judicial notice (*Livermore v. Beal*, 18 C.A. (2d) 535, 540-1). We are attaching as an appendix a full

"It is believed that full use will be made for purposes of irrigation of all the water that can be so stored, and that no assistance to navigation can be expected from such sources.";

(11) In House Document No. 332, 65th Congress, First Session, paragraph 55, page 38, it was stated in regard to the San Joaquin River:

"the hope that better irrigation practices would make available more water for navigation use is futile.";

(12) House Document No. 791, 71st Congress, Third Session, dated February 27, 1931, contained the report of Lytle Brown, Major General, Chief of Engineers, to the Secretary of War, in which it was stated:

"5. * * * *Further improvement above Stockton would require canalization, and the cost would be substantially in excess of the anticipated benefits.*" (p. 6).

"12. * * * *the Friant Reservoir would serve chiefly power development and irrigation.*" (p. 8).

"26. *The Friant project will not benefit navigation, and no Federal contribution to that project appears justified.*" (p. 13);

(13) In House Document No. 791, page 19, being the Report of Herbert Deakyne, Colonel, Corps of

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copy of the Plan of the Central Valley Project, which is in part recited in the findings, portions of the water right purchase agreement between the United States and Miller & Lux Incorporated and a letter from the Commissioner of the Reclamation Bureau stating the policy to make compensation.

Engineers, to the Chief Engineers, it was stated in paragraph 19:

> "The division engineer has considered the further improvement of the river above Stockton to Mendota, 175 miles. *He advises that because of the great need of water for irrigation it is impracticable to increase the low water flow by reservoirs sufficiently to provide a dependable channel for navigation.*";[2]

(14) The Plan itself expressly provided for compensating all persons having water rights on the San Joaquin River for the irrigation of cultivated lands, by exchanging their rights in the San Joaquin River for water brought to them by the Project from the Sacramento River, and expressly provided for the purchase or condemnation of all rights in the San Joaquin River for irrigation of uncultivated or grasslands (Appendix, pp. iii, v, viii);

(15) The Plan for the Central Valley Project was embodied in Rivers and Harbors Document Numbered 35, Seventy-third Congress (Appendix, p. i), and as we have pointed out provided for compensation for all water rights, and this Plan was expressly authorized by Section 2 of the Rivers and Harbors Act of August 26, 1937 (50 Stat. 844, 850), set forth on page 4 of the Petition for Writs of Certiorari herein.

(16) The Bureau of Reclamation immediately after the inauguration of the Plan entered into an exchange agreement with those having water rights

[2]Italics added in paragraphs 11-13.

for cultivated lands on the San Joaquin River aggregating over 1,000,000 acre feet of water[3] and also purchased from Miller & Lux Incorporated its water rights for uncultivated or grass lands for a price aggregating $2,450,000, all of which sum was paid by appropriations by Congress with the exception of amounts aggregating $511,350, which latter sum was paid from appropriations made by Congress into an escrow to be paid to Miller & Lux Incorporated, unless some other person should prove a better right thereto in some action commenced within six years after the initial storage at Friant Dam (R. 95-98);

(17) Feasibility Report, H. Doc. 146, 80th Cong., 1st Sess., pp. 12, 14, indicates that about $5,000,000 had been paid for water rights along the San Joaquin River by January 31, 1946, including $842,000 for the water rights of Chowchilla Lands, Inc. This does not

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[3]The 285,000 acres for which over 1,000,000 acre feet of water are to be exchanged (R. p. 93) all have water rights for cultivated lands. There is no evidence in the record of the value of those water rights, but the cost of the San Joaquin Pumping System which is designed to furnish a substituted water supply for the land, is $19,000,000. (Appendix p. vi.) This does not include any part of the cost of Kennett Dam, transmission line and substation estimated at $98,000,000 (Appendix p. vi) or the cost of perpetually maintaining the pumping system and carrying the water to the land, all of which are useful in creating the substituted water supply. All of this has been given by the Government in exchange for the water of San Joaquin River to which this land was entitled, and which the Government now claims it could have taken without compensation. On the other hand the amount awarded the plaintiffs in the cases at bar was only $94,355.26 of which $67,283.26 has already been paid by the Government into the escrow, leaving only $27,072 and interest to be paid by the Government.

include the 1,000,000 acre feet of water which is to be paid for by furnishing another water supply.[4]

(18) That the Government contemplated that the water rights would be compensated for is also indicated by the fact that the administration of the Project was transferred from the Corps of Engineers to the Bureau of Reclamation by the Act of December 5, 1924 (43 Stat. 702), and this brought the Project under Sections 7 and 8 of the Reclamation Act of 1902 (32 Stat. 388, 43 U.S.C., Sections 421, 383), which provide:

> "Sec. 421. Where in carrying out the provisions of this chapter it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Interior, under this chapter, to cause pro-

[4] These payments were made with the full knowledge of Congress. See eg. Interior Department Appropriation Act for fiscal year 1938, 50 Stat. 597; House Report 786, 75th Cong. 1st Sess. p. 15; Hearings before House Committee on Appropriations, pp. 281-282; Interior Department Appropriation Act for fiscal year 1939, 52 Stat. 291; House Report 1855, 75th Cong., 3rd Sess. p. 14; Hearings before House Committee on Appropriations, p. 349; Interior Department Appropriation Act for fiscal year 1940, 53 Stat. 685; House Report 161, 76th Cong. 1st Sess. p. 16; Hearings before House Committee on Appropriations, pp. 421-422; see, generally, Hearings before the House Committee on Appropriations, Interior Department, 74th Cong. 2nd Sess., pp. 179-181; Hearings before House Committee on Appropriations, Interior Department, 79 Cong. 1st Sess. p. 1200. See *Brooks v. Dewar*, 313 U.S. 354, 360-361.

ceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice." (43 U.S.C.A., Sec. 421.)

"Sec. 383. Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (43 U.S.C.A., Sec. 383.)";

(19) The evidence showed that all the water of the San Joaquin River was taken by the Government for irrigation of non-riparian lands in the Counties of Madera, Merced, Fresno, Tulare, Kings and Kern, California (R. p. 90);

(20) In the document entitled "Hearings before the Committee on Flood Control, House of Representatives, Seventy-Fourth Congress, First Session, Central Valley Project of State Water Plan of California" held on February 7, 8 and 9, 1935, the following took place:

"Mr. Zimmerman. Is there any navigation at all on the San Joaquin River?" (p. 70)

"Mr. Hyatt. Not far above Stockton. There is really none on the river above tidewater." (p. 71)

* * * * * * *

"Mr. Wallgren. Would this money be expended to make the San Joaquin navigable?

Mr. Hyatt. No. We advanced that idea to the War Department but they deferred it. It is not in this plan.

Mr. Wallgren. The navigation feature in this bill applies to the Sacramento only?

Mr. Hyatt. Yes, sir." (p. 72)

(21) On the hearings on the Interior Department Appropriation Bill for 1938 the appropriation for the Central Valley Project was considered and in Part 2, page 1588, Mr. Hyatt (State Engineer of California), after sketching the purposes of the Kennett Dam on the Sacramento River, including the improvement of navigation on that River, stated:

"Another dam will be built on the San Joaquin River, right back of the city of Fresno. This is called the Friant Reservoir, and from that, large-sized canals will be built north and south, to serve the million acres which is in distress in the San Joaquin Valley.

The project involves the purchasing of water rights on second-class land, pasture land, so that its immediate effect will be to retire 250,000 acres of submarginal land which is now being irrigated."

On page 1605, Representative Buck stated:

"Now, it has taken a long time, seemingly, to go out and negotiate with the owners of the water

rights along the river, because this water in California is subject to two laws: Appropriation, which is the general law of the West, and riparian rights, which are also recognized in California. Both of them have to be taken into consideration, and in many cases, both kinds of owners have to be compensated, in order to secure the rights for the Friant Dam and for the other reservoirs that may be built.

I am advised that those negotiations are practically at an end."

And on page 1616 Mr. Hyatt stated:

"I think, in actual cash, this amount will be required for payments to the contractors for the purchase of water rights and rights-of-way, before the end of the fiscal year 1938."

(22) Before the Dam was constructed the Commissioner of the Bureau of Reclamation gave written assurance to the landowners that

"The policy of the Government is to compensate equitably those whose property rights will be adversely affected as a result of the construction of Friant Dam." (Appendix, p. xvi.)

(23) It appeared that the dam had been permanently closed on the 20th day of October, 1941, and 17,400 acre feet of water was permanently stored therein followed in 1944 by the storage of 302,600 acre feet and in 1945 by the storage of 430,000 acre feet (R., pp. 98-102);

(24) It appeared that the taking of October 20, 1941, depreciated the value of the property included

in the cases at bar $9.00 per acre (Findings 29, R., p. 88; 56, R., p. 110; 57, R., p. 110; 63, R., p. 113; 75, R., p. 123; 85, R., p. 127; 87, R., p. 128; 42, R., p. 188; 46, R., p. 190; and 49, R., p. 190).

THE FINDINGS.

The Court of Claims found:

> "Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land non-riparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings, and Kern in the State of California * * *" (Finding 32).
>
> "The plan contemplated that the United States would acquire all existing rights to the use, diversion, and storage of the waters of the San Joaquin River flowing at Friant." (Finding 32, R., p. 90.)

The Court of Claims also found that the water of the Sacramento River would be carried for 150 miles and lifted 160 feet in order to supply the crop lands theretofore irrigated from the San Joaquin River.

> "This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting *the entire flow* of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and

southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south." (R., pp. 91-2.)

The Court of Claims also found:

"Defendant's plan, as modified, contemplated that the United States should eventually store and divert to non-riparian use all the waters of the San Joaquin River flowing at Friant, except for occasional spills." (Finding 35, R., p. 94.)

The Court of Claims further found:

"Defendant's plan contemplated that compensation for the acquisition of the right to the use of water on crop lands would be made by providing a substitute supply of water from the Sacramento River through the pumping system. Pending the construction and completion of the pumping system, the plan contemplated that sufficient water would be released from the Friant Reservoir to meet the requirements of the crop land rights.

The plan contemplated that the grass land rights and the riparian rights were to be purchased or otherwise acquired by the defendant, and the riparian rights extinguished." (Finding 35, R., pp. 94-95.)

The Court of Claims further found:

"the defendant agreed to pay to Miller & Lux Incorporated and its subsidiaries the sum of $2,450,000 for the water rights so to be conveyed. The defendant arrived at this amount on the basis of the appraisals of its board, which fixed an average price of approximately $13 per acre for the appropriative and prescriptive controlled grass-

land rights and approximately $9 per acre for the riparian rights of uncontrolled grasslands." (Finding 37, R., pp. 95-96.)

PLAINTIFFS' CLAIMS.

Under these circumstances we submit that the taking of the water of the San Joaquin River for irrigation was not in aid of navigation, that even if such taking in any incidental manner aided navigation or flood control the United States had waived any sovereign immunity with respect to the taking of the water of the San Joaquin River and had agreed to make compensation to those having rights in such water, and that plaintiffs were entitled to recover the depreciation in the value of their lands, together with interest from October 20, 1941, until paid.

ARGUMENT.

I.

EVEN IF THE PROJECT WAS TO ANY EXTENT IN AID OF NAVIGATION OR FLOOD CONTROL, IT IS CLEAR FROM BOTH THE STATE AND FEDERAL HISTORY OF THE PROJECT AND THE TERMS OF THE PLAN ITSELF THAT CONGRESS DID NOT INTEND TO RELY UPON THAT FACT TO ENABLE IT TO DESTROY VESTED RIGHTS OF IRRIGATORS WITHOUT COMPENSATION, BUT ON THE CONTRARY EXPRESSLY PROVIDED FOR COMPENSATION TO THE IRRIGATORS OF BOTH CULTIVATED LANDS AND GRASS LANDS.

It is well settled that Congress had full power to waive and relinquish any immunity which the United States has to pay compensation due to the navigation

or flood control features of the Project. (*Henry Ford & Son v. Little Falls Fibre Company,* 280 U. S. 369.) That such immunity was waived is clear from the previous history of the Project, from the terms of the Plan, from the acts of the Department of the Interior making compensation, and the Acts of Congress approving the Plan and appropriating money from which payments were made.

The deliberate and ratifying action of Congress gives the force of law to the prior official action even if unauthorized when taken. (*Silas Mason Co. v. Tax Comm.,* 302 U. S. 186, 208.)

This is in line with the attitude of Congress expressed by Section 1(b) of the Flood Control Act of December 22, 1944, 58 Stat. 887, by which Congress expressly provided that the water rights of landowners in the western states based on consumptive uses should be considered superior to the right of the United States to make improvements in aid of navigation under the Flood Control Act.

The same thing is shown by the action of Congress in transferring the Project to the Secretary of the Interior under the Reclamation Law, since under the Reclamation Act the Secretary "must obtain permits and priorities for the use of water from the State * * * in the same manner as a private appropriator or an irrigation district formed under the state law" (*Nebraska v. Wyoming,* 295 U. S. 40, 43).

Under Section 8 of the Act the Secretary is required to recognize all water rights under state law.

Under Section 7 of that Act he is required to make compensation for water taken for the Project. Why should the Secretary be criticized for doing so in view of the fact that an administrative agency created by Congress to carry on governmental activities are circumscribed by the authority granted by the Act or Acts of Congress pertaining thereto (*Montana-Dakota Utilities Co. v. Federal Power Com'n.*, 169 F. (2d) 392, 397.)

As we have already pointed out, the Plan authorized by Congress from its very inception provided for making compensation. With respect to three of the cases here involved the Government had contracted to pay Miller & Lux compensation and to pay from an escrow created by it compensation to anyone else showing a better right thereto. It had also paid Miller & Lux in cash close to $2,000,000 for damages to lands of the same type as the lands of plaintiffs. As to the other three cases the judgments merely apply to the lands involved therein the same rate of damages fixed by the government as to the other three cases. The Department of the Interior had made written declaration of the policy of the Government to make compensation.

The undisputed facts shown by the record are that the average yearly flow of the San Joaquin River is 1,811,082 acre feet (R., p. 85). Prior to the adoption of the Central Valley Project, 1,458,538 acre feet of this water had been acquired by prescriptive and appropriated rights by controlled irrigation (R., p. 84).

Besides this, 246,000 acre feet were beneficially used by uncontrolled flow over 82,000 acres of grasslands using three acre feet per acre, or 246,000 acre feet (R., pp. 88-9). This indicates a total beneficial use of 1,705,138 acre feet of water, which is almost equal to the average annual flow of the River. The record shows that this water was used on 285,000 acres of crop lands (R., p. 93) and 250,000 acres of submarginal or grasslands (Appendix p. viii), making a total area benefited amounting to 535,000 acres of land. The record further shows that the Plan contemplated that the water theretofore used on this acreage would be carried by the Madera Canal to 140,000 acres (Appendix, p. vi) and by the Kern Canal to 1,000,000 acres in the southern part of the Valley (Appendix, p. vi), making 1,140,000 acres to benefit by the water theretofore used by plaintiffs and other irrigators.

This area involved one of the largest irrigated areas in the world. Must it not be assumed that not only the owners of those water rights but the State and Federal Government were solicitous of the rights of that area and framed legislation to protect those rights in order that other areas might be developed? The danger that it might be claimed that the rights might be seized without compensation in view of the alleged navigable character of the River was no secret and therefore a plan was formulated that required compensation, and Congress approved that plan and appropriated money to make such compensation. To now contend that no compensation is due because of

the relatively small, if any, effect on navigation or flood control, is to make a contention which Congress would not have countenanced and which it flatly repudiated.

II.

THE ACTS OF THE DEFENDANT IN CLOSING THE DAM AND IMPOUNDING 17,400 ACRE FEET OF WATER IN OCTOBER, 1941, CONSTITUTED A TAKING OF PLAINTIFFS' RIGHTS.

The findings on this subject are found in the record, pages 32 to 37. These acts clearly constituted a taking within the reasonable rule laid down by this Court in *United States v. Dickinson*, 331 U. S. 745. The Government clearly considered that this initial storage constituted a taking, because in its contract with Miller & Lux Incorporated it provided that actions must be brought "prior to the sixth anniversary after the initial storage or diversion of waters of the San Joaquin River by the United States by means of Friant Dam" (Appendix, p. viii).

The fact that both the Bureau and Miller & Lux Incorporated considered the "initial storage" on October 20, 1941, to constitute a taking, is clear from the finding that the contract only authorized deductions therein by the Government where they were authorized by actions commenced "prior to the sixth anniversary after the initial storage". (R., pp. 96-7). Obviously this referred to the six-year period allowed for suing under the Tucker Act. That period runs from the "taking". This definitely fixes the initial storage as the taking.

That the storage of this 17,400 acre feet of water constituted a taking is obvious in view of the fact that under the law of the State the storage of that quantity of water for a public purpose impressed the water of the river to the full capacity of the reservoir with that public use and deprived the plaintiffs of any right to recover the same.

Collier v. Merced Irrigation District, 213 Cal. 554.

III.

THE COURT WAS FULLY JUSTIFIED IN AWARDING INTEREST FROM OCTOBER 20, 1941, TO DATE OF PAYMENT.

The only objection to the allowance of interest is based on the fact that due to war conditions which commenced in December, 1941, the Government was unable to complete its Project and actually use all the water contemplated to be taken by the Project, although as we have already pointed out, it did store 17,400 acre feet in 1941, 302,600 acre feet in 1944 and 430,000 acre feet in 1945 (R., pp. 101-2). The taking in a legal sense being complete on October 20, 1941, the compensation is to be fixed as of that date, and the amount allowed as interest is not interest in the legal sense, but is compensation for delay, for which the Court allowed only 4%. It would be unendurable to have the compensation depend on the actual use rather than on the use which the condemnor was entitled to make. It is well settled that it must be assumed that the condemnor will make the use which

it is entitled to make to the extent most injurious to the landowners, and that damages must be fixed on that assumption.

East Bay Municipal Utility District v. City of Lodi, 120 Cal. App. 740, 762.

It should be noted that the contract by which the Bureau set up the escrow was dated July 27, 1939, and provided that Miller & Lux Incorporated should be entitled to interest from the date of the contract. In view of that fact the Government was not injured by an allowance of interest from October 20, 1941 (Appendix p. xv).

IV.

THE FINDINGS AS TO THE RIGHT TAKEN WERE SUFFICIENT.

The petitions alleged the riparian rights of plaintiffs and that the Plan was to take all of the water of the San Joaquin River flowing at Friant for the irrigation of non-riparian lands in certain specified counties (Par. VI, R., p. 2; Par. V, R., p. 19; Par. IV, R., p. 46; Par. V, R., p. 150; Par. IV, R, p. 155, and Par. V, R., p. 158). The Court found that that was what was taken (Finding 32, R., p. 90). The Court also found the depreciation which took place in the value of plaintiffs' land by this taking. (Findings 29, R., p. 88; 42, R., p. 188; 46, R., p. 190; 49, R., p. 190; 56, 57, R., p. 110; 63, R., p. 113; 75, R., p. 123; 85, R., p. 127, and 87, R., p. 128.) There was therefore no uncertainty as to the right taken.

V.

THE RULING OF THE COURT OF CLAIMS THAT THE CALIFORNIA CONSTITUTIONAL AMENDMENT IN NO WAY DEPRIVED THE PLAINTIFFS OF THEIR RIGHT TO COMPENSATION FOR DEPRECIATION IN VALUE OF THEIR LAND BY THE TAKING OF ALL THE WATER OF THE RIVER, WAS FULLY JUSTIFIED.

While the contrary contention is not relied upon by petitioner as a ground for the issuance of the writs, we deem it proper to call to the attention of the Court that the Supreme Court of California has held that Constitutional Amendment to be no bar to recovery by plaintiffs.

Hillside Water Company v. City of Los Angeles, 10 Cal. (2d) 677, 76 P. (2d) 681;

City of Lodi v. East Bay Municipal Utility District, 7 Cal. (2d) 316, 60 P. (2d) 439;

City of Los Angeles v. Aitken, 10 C. A. (2d) 460, 52 P. (2d) 585;

Los Angeles County Flood Control District v. Abbot, 24 C. A. (2d) 728, 76 P. (2d) 188;

Meridian Ltd. v. The City and County of San Francisco, 13 Cal. (2d) 424, 90 P. (2d) 537;

City of Elsinore v. Temescal Water Company, 36 C. A. (2d) 116, 97 P. (2d) 274;

Williams v. City and County of San Francisco, 24 C. A. (2d) 630, 76 P. (2d) 182.

In the cases at bar the defendant had full opportunity to develop what was a reasonable method for the watering of grasslands and to have the value of the lands with and without water fixed accordingly. Whether or not it did so is not material on this ap-

peal, where there is no error relied upon as to the admission of evidence respecting the basis for fixing the damages.

In the petitions plaintiffs alleged that they were entitled to all the rights of riparian owners. The Court takes judicial notice of what those rights are, and no allegation or finding thereof was necessary. Whatever limitation the Constitutional Amendment made upon riparian rights theretofore recognized in the state is implicit in the finding that the damage was caused by the taking of the riparian rights of the plaintiffs (Findings 29, R., p. 88; 42, R., p. 188; 46, R., p. 190; 49, R., p. 190; 56-7, R., p. 110; 63, R., p. 113; 75, R., p. 123; 85, R., p. 127, and 87, R., p. 128).

CONCLUSION.

It should be noted that in the three cases at bar covered by the Miller & Lux contract it is expressly provided that the Government must take an appeal entirely irrespective of the merits of the appeal unless an appeal is waived by Miller & Lux Incorporated. (See Appendix, p. xiv.) The cases would seem to present a situation where the Government acting through Congress recognized the justness of making compensation where water was taken away from land of a certain type in the northern portion of the San Joaquin Valley for the irrigation of another type of land in the southern part of the San Joaquin Valley. It actually made such compensation to the extent of $2,450,000 to Miller & Lux Incorporated, and in effect

agreed that if these judgments had not been rendered the part thereof held in escrow would likewise be paid to Miller & Lux. The Government now through the Solicitor General makes the claim that no compensation need be made to the plaintiffs or to any other person for taking away their water rights. This is most extraordinary in view of the further fact that the Government has also promised to pay to Miller & Lux and its subsidiary canal companies for 1,000,000 acre feet of water used for cultivated lands by delivering to them water carried 150 miles from the Sacramento River and raised 160 feet. All of this inconsistency is for the purpose of preventing the Government from paying $9.00 an acre to the plaintiffs, rather than $9.00 an acre to Miller & Lux Incorporated. We realize that this brief is longer than we would like, but we justify it on account of the duty we feel we owe, not only to the plaintiffs, but to all water right owners who have relied upon the assurance of the Government that they would be compensated.

We respectfully submit that the writs should be denied.

Dated, San Francisco, California,
November 8, 1948.

EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Attorneys for Respondents.

(Appendix Follows.)

Index to Appendix

		Page
A.	Plan of the Central Valley Project	i
B.	Contract for purchase of Miller & Lux water rights dated July 27, 1939	xi
C.	Letter June 22, 1939, from John C. Page, Commissioner, to Mr. Walker R. Young	xvi

A.

PLAN OF THE CENTRAL VALLEY PROJECT EMBODIED IN RIVERS AND HARBORS DOCUMENT NUMBERED 35, SEVENTY-THIRD CONGRESS AUTHORIZED BY SECTION 2 OF THE RIVERS & HARBORS ACT OF AUGUST 26, 1937 (50 STAT. 844, 850), SET FORTH ON PAGE 4 OF THE PETITION FOR WRITS OF CERTIORARI HEREIN.

The Secretary of the Interior

Washington

November 26, 1935

The President,

The White House.

My dear Mr. President:

The Supreme Court of the United States in the Parker Dam decision (United States v. State of Arizona, 295 U.S. 174) indicated that Section 4 of the Act of June 25, 1910 (36 Stat. 835), is applicable to irrigation projects constructed under the National Industrial Recovery Act and this report on the Central Valley project, California, is made to you under said statute of 1910 and under subsection B of Section 4 of the Act of December 5, 1924 (43 Stat. 702).

Section 4 of the Act of June 25, 1910 (36 Stat. 835), provides, in effect, that after the date of that act no irrigation project to be constructed under the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, shall be undertaken unless and until the project shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

Subsection B, Section 4, Act of December 5, 1924 (43 Stat. 702), provides as follows:

> "That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

General Description of Project.

The Central Valley project embodies a plan for the conservation, regulation, distribution and utilization of the water resources of the Sacramento and San Joaquin rivers to provide urgently needed water supplies for existing agricultural, industrial and municipal developments in the Sacramento and San Joaquin valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled irrigated and productive land, and a population of 90,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt hours annually of hydroelectric energy.

The key unit of the project is Kennett Reservoir on the Sacramento River. A dam 420 feet high will

regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navigation and furnishing ample supplies for irrigation, municipal and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in recent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco Bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

The cost of the project, estimated at $170,000,000, will be met by revenues from the sale of water and power.

Water Supply.

The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature has filed notices of appropriation on the principal streams, which are in good standing. Water supplies studies made by the Department of Public Works of California, U. S. War Department and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

Engineering Features.

The principal engineering features of the project are as follows:

Kennett Dam Unit—The Kennett reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k.v.a. power plant will be located below the dam. A reregulating afterbay with a 50,000 k.v.a. power plant will be constructed below the Kennett dam. From the power plants a 200 mile power transmission line will extend to a main distributing substation near Antioch on Suisun Bay.

Contra Costa Conduit—A canal, capacity 120 second feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial and agricultural water requirements.

San Joaquin Pumping System—The works for this pumping system will comprise a dam and other works in Sacramento delta to divert stored water from Kennett reservoir through a channel into San Joaquin delta for salinity control, irrigation and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota Weir on San Joaquin River, elevation 160 feet. These works will be capable of furnishing a substituted supply of 1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

Friant Reservoir—A dam, 250 feet high, will be be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through the means of the San Joaquin River Pumping System and the purchase of water rights in the San Joaquin River.

Friant-Kern Canal—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

Madera Canal—The Madera Canal, maximum capacity 1500 second-feet, will extend from Friant reservoir to Chowchilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

Estimated Cost of Project.

Kennett dam, reservoir and power plants	$ 84,000,000
Kennett transmission line and substation	14,000,000
Contra Costa Conduit	2,500,000
San Joaquin Pumping System	19,000,000
Friant dam and reservoir	14,000,000
Friant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights and general expenses	8,000,000
Total	$170,000,000

First Year Construction Program.

Under date of September 10, 1935, you approved an allocation of $20,000,000 for the Central Valley Project, which amount was later reduced to $15,000,000. Construction on the following units is recommended for the first year:

Kennett Reservoir Unit Contra Costa Conduit
Friant Dam and Canals.

An amount of $15,000,000 can be efficiently and economically expended on the foregoing units during the first year of construction.

Adaptability of Land for Irrigation, Crop Production and Settlement.

The climate is favorable and the soil, if water is available, is adaptable to the production of a wide variety of crops. The principal crops now raised in the San Joaquin Valley are citrus and deciduous fruits, grapes, alfalfa, cotton, nuts, and figs; in the Delta, asparagus, celery, potatoes as well as deciduous fruits; and in the Sacramento Valley there is a heavy production of rice in addition to other grains and deciduous fruits.

The valley is highly developed. The lands are of high value and produce large returns. With an attractive climate, fertile soil and stable markets, water is the one remaining necessity to prosperous, successful agricultural industry. It has been highly successful and supports a large farm population. Much of the fruit is shipped to eastern markets but many other items, such as the products of dairying, are marketed within the state and reduce the quantities imported into the state. Products are largely non-competitive with other sections of the country, since many of them, such as nuts, figs, raisins, asparagus, are produced almost wholly in California.

Transportation facilities are excellent. These include railroads and improved highways leading to the Metropolitan center of Los Angeles and San Francisco and to eastern markets.

The project is not designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of

a high type. Any increase in irrigated land will be small and will come into being slowly over a long period of time. Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

Social and Economic Values.

The economic values of the project are of great magnitude. The project will not bring into production new agricultural areas but will maintain present values and civilization. Of the 3,000,000 acres now irrigated, 1,000,000 face acute water shortage, and abandonment is proceeding rapidly. The values in jeopardy are large, as without water, not only will lands dry up, but communities will vanish and whole sections return to desert, as is now occurring in the San Joaquin valley. A share of the loss will be suffered by persons not residing in the areas directly affected.

Control of salinity in the delta of the two rivers near Sacramento is part of the agricultural maintenance phase of the project. Here 400,000 irrigated acres with an annual crop value of $30,000,000 are menaced by salt water from upper San Francisco Bay. Some abandonment has occurred and the whole area is endangered. In this same general area is a large industrial section which is also short of water by reason of increasing salinity. Here 100 industrial plants

produce annually $100,000,000 value of manufactured products, and while not facing extinction, are suffering damage and expense from lack of water.

Navigation on the Sacramento River, one of the important waterways of the nation, has been greatly damaged by low water, navigation having been practically abandoned above Sacramento in the summer season. The national navigation and flood values of the project have been found by the War Department to be $12,000,000, and the recently enacted Rivers and Harbors Bill (Public No. 409, 74th Congress), by reference to the War Department report approves the project and authorizes the appropriation of $12,000,000 for it.

A large power house at the main storage dam will produce nearly a billion and a half kilowatt hours of electric energy annually, which will be sold at less than existing rates, thereby benefiting power users and at the same time producing a large revenue, which will go toward the repayment of the construction costs.

Probable Return to Reclamation Fund Of Cost of Construction.

The next declaration required is that the cost of construction will probably be returned to the Federal Government. This is interpreted to mean that it will be returned within forty years from the time the Secretary issues public notice that water is available from the project works. The estimated cost of construction is $170,000,000 and the annual cost, includ-

ing repayment of all other charges is $7,500,000. It is estimated that annual revenues from the sale of water and of electric power will be sufficient to cover these charges. The favorable conditions heretofore recited justify the belief that the project will return its cost.

I find that the project is feasible from engineering, agricultural and financial standpoints, that it is adaptable for settlement and farm homes, that the estimated construction cost is adequate and that the anticipated revenues will be sufficient to return the cost to the United States.

The Commissioner of Reclamation has approved and recommended the construction of the project. I therefore recommend the approval of the Central Valley development as a Federal reclamation project.

Sincerely yours,
(Sgd.) Harold L. Ickes,
Secretary of the Interior.

Approved: Dec. 2, 1935.
Franklin D. Roosevelt,
President.

B.

PORTIONS OF CONTRACT FOR PURCHASE OF MILLER & LUX WATER RIGHTS DATED JULY 27, 1939.

"Payment of Purchase Price and Conveyance of Properties.

"13. The Vendors shall, within fifteen (15) days after notice of the execution of this contract by the United States, execute and deliver to the United States a deed, in the form annexed hereto and marked Exhibit "A", duly executed and acknowledged by the Vendors, conveying to the United States all of the property and property rights herein agreed to be conveyed, together with a deed of reconveyance from The Bank of California, N. A., as Trustee, wherein and whereby said Trustee shall reconvey to Miller & Lux, Incorporated, a corporation, all of the water rights, or rights to the use of water, and other rights or properties, herein agreed to be transferred and conveyed to the United States, free and clear of the lien of that certain Trust Indenture dated the first day of October, 1925, wherein Miller & Lux, Incorporated was Trustor and the said The Bank of California, N. A. was Trustee. The United States shall purchase said water rights, or rights to the use of water, and other rights and properties herein agreed to be conveyed on the terms herein expressed, and upon execution and delivery of said deed and said deed of reconveyance, it shall cause to be paid to the Vendors as full purchase price and full payment for all damages for taking possession of said rights and for entry upon said property, and damages resulting from the construction,

operation and maintenance of said Friant Dam and other works to utilize such rights, the sum of two million, four hundred and fifty thousand dollars ($2,450,000.00), of which sum $1,938,650.00 shall be paid to Vendors and $511,350.00 thereof shall be deposited in escrow, within the period as hereinafter in Subdivision (e) of Article 14 of this contract provided."

* * * * * * *

"(e) Of the sum of $2,450,000.00, payable to Vendors as provided by this Contract, the sum of $1,938,650.00 shall be paid unconditionally within sixty days after the delivery of the deed as provided by this Contract. The remainder of said sum, to-wit, $511,350.00, shall within said period of sixty days be deposited with such escrow agent as may be selected by the Secretary of the Interior, to be then invested by said escrow agent, at current open market prices, in such Federal securities as may be agreed on between the Secretary of the Interior and the Vendors, and thereafter said securities shall be held in escrow on the terms and conditions herein provided.

"There is delivered herewith to each of the parties hereto, and as part of this Contract, a duplicate original of a map marked Exhibit "B" and entitled "Bureau of Reclamation, United States Department of the Interior, Central Valley Project—Map showing grass lands and riparian lands basic to contract between the United States, and Miller & Lux, Inc. and Gravelly Ford Canal Company, dated July 27, 1939" and identified by the signatures of the respective parties hereto, upon which are delineated certain lands

in this contract referred to as "Grass Lands" and as "Riparian Lands". The boundaries of said Grass Lands are outlined in green and the boundaries of the Riparian Lands are outined in orange. Said map need not be recorded.

"In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters of the San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit "B", are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow an amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grass lands.

"In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit "B", are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall

be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands and $13.00 per acre for each acre of said grass lands, which by said judgments are decreed to be entitled to receive such water from the San Joaquin River; provided, that the total obligation of Vendors under this Subdivision (e) of Article 14 shall not exceed but shall be limited to the principal of funds or securities so escrowed, exclusive of costs incidental to said escrow.

"IT IS AGREED AND UNDERSTOOD that there shall be no payment out of said escrow as the result of final judgments or decrees entered by the consent of the United States, or as the result of failure by the United States to defend said actions or to appeal said actions, unless said judgments or decrees are entered or permitted to be entered with the consent of the Vendors.

"No part of the escrow fund herein provided for shall be used to pay costs, expenses, or attorneys' fees incurred in defense of said suits and actions referred to in this subdivision (e) of Article 14, it being understood and agreed that the United States and Vendors shall each pay its costs, expenses and attorneys' fees, if any, incurred in said litigation.

"Payment out of the escrow shall be made annually at or within thirty days after the end of each calendar year, each payment to cover all final judgments or decrees as above described entered during each said year. Payment shall be made by the delivery by the escrow agent to the Secretary of the Interior, or his

authorized representative, of securities equal to the amount then owing to the United States, or as near thereto as possible considering the basic units of the securities in escrow. For this purpose, securities delivered shall be valued at the current market values thereof.

"When final judgments in all suits above described have been entered and payment therefor made as herein provided, or such suits have been finally dismissed, the balance of securities remaining in the hands of the escrow agent shall be delivered to the Vendors. Final adjustment shall then also be made to cover discrepancies between amounts actually owing to the United States hereunder, and amounts actually paid by the periodic delivery of securities.

"Interest accrued on securities remaining in escrow on any interest maturity date shall become the property of the Vendors, and the escrow agent shall at such times deliver the matured coupons to the Vendors. The costs of the escrow shall be borne by the Vendors.

"The escrow agent shall reinvest the principal of escrowed securities that mature or are retired during the life of the escrow, in such Federal securities as are designated by the parties hereto."

C.

United States
Department of the Interior
Bureau of Reclamation
Washington

June 22, 1939

Office of the Commissioner
Mr. Walker R. Young,
Supervising Engineer, U. S. Bureau of Reclamation,
Old Post Office Building,
Sacramento, California.

Dear Mr. Young:

It has come to my attention that there has been some apprehension among landowners along the San Joaquin River between Friant and Gravelly Ford concerning the effect upon their lands through construction of Friant Dam.

The policy of the Government is to compensate equitably those whose property rights will be adversely affected as a result of the construction of Friant Dam.

The investigations now being made by the Bureau of Reclamation are intended to determine the effect Friant Dam will have on these properties in order that damages may be ascertained and compensation made before such damages actually occur.

You may assure the landowners that if and when our investigations determine the extent to which their

property rights will be invaded, appropriate action will be taken.

Very truly yours,
(Sgd.) John C. Page
Commissioner.